STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of **DTE ELECTRIC COMPANY** for authority to increase its rates, amend its rate schedules and rules governing the distribution and supply of electric energy, and for miscellaneous accounting authority.	))))))	Case No. U-18255

At the June 15, 2017 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER GRANTING REHEARING AND CLARIFICATION

On April 19, 2017, DTE Electric Company (DTE Electric) filed a general rate case in Case No. U-18255.[1] Petitions seeking leave to intervene in this proceeding were filed by The Kroger Company, the Association of Businesses Advocating Tariff Equity (ABATE), the Michigan Cable Telecommunications Association, Constellation NewEnegry, Inc. (CNE), the Michigan Environmental Council, the National Resources Defense Council, the Sierra Club, Energy Michigan, Michigan Waste Energy, Inc., d/b/a Detroit Renewable Power, Detroit Thermal, LLC, the Environmental Law & Policy Center, the Midwest Cogeneration Association, Local 223

[1] By filing its electric rate case on April 19, 2017, DTE Electric preserved an opportunity under a now rescinded provision of Public Act 186 of 2008 (Act 286) to self-implement an interim rate increase after the passage of 180 days. Another now rescinded statutory provision in Act 286 permits the Commission to issue its final order in this proceeding within 365 days of the filing of the application.

of the Utility Workers of America – AFL-CIO, Walmart Stores East, LP and Sam's Club East, Inc., the Detroit Public Schools, the Residential Customer Group (RCG), and the Department of the Attorney General (Attorney General). The Commission Staff (Staff) is also participating in the proceedings.

On May 11, 2017, the Commission issued an order in Case Nos. U-18197 *et al*., (May 11 order).[2] The May 11 order was intended "to reinforce the Commission's determination to address certain issues related to its implementation of Section 6w of 2016 PA 341 (Act 341), MCL 460.6w, solely through the use of the technical conferences instead of in the context of contested cases." May 11 order, p. 2.[3] More specifically, the Commission indicated that "the format for the demonstration required of an electric utility by Section 6w(8)(a) of Act 341, MCL 460.6w(8)(a) that the utility 'owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable' for the 'planning year beginning 4 years after the beginning of the current planning year' was to be determined through collaborative efforts in the technical conferences." May 11 order, pp. 2-3. The Commission also stated that "the format for the demonstrations required of AESs[4], cooperative electric utilities, and municipally-owned electric utilities by Section 6w(8)(b) of Act 341, MCL 460.6w(8)(b) also was to be determined through collaborative efforts in the technical conferences." May 11 order, p. 3.

[2] The docket for Case No. U-18255 was included as one of the captioned cases in the May 11 order.

[3] A central aspect of the technical conferences is the methodology for establishment of a state reliability mechanism (SRM) and its associated term, which is required by MCL 460.6w.

[4] "AESs" is a reference to alternative electric suppliers.

On May 18, 2017, Administrative Law Judge Mark D. Eyster (ALJ) conducted a prehearing conference at which all of the intervention petitions were granted. However, it is readily apparent that some of the parties to this proceeding had formulated differing opinions regarding the intent of the Commission's May 11 order. Indeed, pursuant to a schedule set by the ALJ at the prehearing conference, on May 26, 2017, CNE, the Staff, and Energy Michigan filed separate motions to strike portions of the testimony submitted by DTE Electric's witnesses regarding the SRM issues addressed by DTE Electric's witnesses. On the same date, ABATE filed a motion for summary disposition of these issues and the RCG filed seeking amendment or dismissal of DTE Electric's application.

Also on May 26, 2017, DTE Electric filed a petition for rehearing and clarification of the May 11 order. In so doing, DTE Electric stated that it was seeking expedited rehearing and clarification regarding the Commission's determination in the May 11 order that certain SRM issues pending in its April 19, 2017 rate case application in Case No. U-18255 should be addressed in other cases. Timely answers to DTE Electric's petition for rehearing and clarification were filed by the Staff, CNE, and ABATE. CNE and ABATE maintain that DTE Electric's petition for rehearing and clarification should be denied. The Staff maintains that the Commission should grant DTE Electric's petition for rehearing and clarification "to alleviate confusion among the parties in this matter." The Staff's answer, p. 1.

DTE Electric

In its petition for rehearing and clarification, DTE Electric expresses concern that the May 11 order could deprive the utility of the opportunity to accurately set its general service rates in this proceeding. DTE Electric maintains that it should be allowed in this proceeding to present evidence on all elements of its total costs, which would of necessity include all costs identified as

capacity-related costs. DTE Electric is also seeking clarification that the utility will have the opportunity in the context of this proceeding to "address any SRM and capacity charge matters related to the terms and conditions set forth in the Company's tariffs." DTE Electric's petition for rehearing and clarification, p. 3. Additionally, DTE Electric insists that it should be permitted in this proceeding to establish the capacity charges that will be available for assessment beginning June 1, 2018, based on the total cost of service as determined in this proceeding. According to DTE Electric, to do otherwise would infringe on the utility's fundamental due process rights and impair proper implementation of MCL 460.6w.

Citing MCL 460.6a(2)(b), which defined the term "General rate case" before the April 20, 2017 effective date of Act 341, and MCL 460.6a(16)(b), which defines "General rate case" after the effective date of Act 341,[5] and MCL 460.6w(5), which states that "Not less than once every year, the commission shall review or amend the capacity charge in all subsequent rate cases, power supply cost recovery cases, or separate proceedings established for that purpose," DTE Electric contends that the May 11 order was wrongly decided, and that the Commission must grant its requested clarification to allow the utility to include the SRM and capacity charge calculations and all related issues in its currently pending electric rate case. According to DTE Electric, it "filed testimony and exhibits addressing necessary SRM and capacity charge matters in order to properly and lawfully prosecute its general rate case" and not to keep its options open. DTE Electric's petition for rehearing and clarification, p. 6. DTE Electric also insists that it would be an untenable denial of the corporation's due process rights under the U.S. and Michigan Constitutions, in contravention of the Commission's enabling statutes, and in violation of the

[5] A comparison of MCL 460.6a(2)(b) and MCL 460.6a(16)(b) reveals that the Legislature re-numbered this section in Act 341 without making any actual change to the definition of the term "General rate case."

Administrative Procedures Act, MCL 24.201 *et seq*, for the Commission to attempt to establish the utility's SRM and/or capacity charges without an appropriate record and findings in Case No. U-18255. DTE Electric's petition for rehearing and clarification, pp. 6-8.

Next, DTE Electric contends that the Commission cannot ensure that the utility's rates will be based on cost of service principles if the SRM-related costs are determined in another proceeding. Further, while observing that "some valuable groundwork may be laid in 'technical conferences' and SRM Case No. U-18248," DTE Electric argues that its "pending rate case still must be fully developed and adjudicated based on the costs set forth in that case." DTE Electric's petition for rehearing and clarification, p. 9. DTE Electric insists that some intervenors have read the May 11 order far too broadly, and will be mounting efforts to promote their individual interests. In so doing, DTE Electric repeats its contention that the Commission may only lawfully base determinations on the SRM issues in Case Nos. U-18248 and U-18255.

To bolster its contentions, DTE Electric stresses that its current SRM case, Case No. U-18248, is based on cost data from the utility's previous rate case, Case No. U-18014; whereas its currently pending rate case is based on different, updated data. Citing *Pennwalt v Public Service Comm*, 166 Mich App 1; 420 NW2d 156 (1988) and MCL 460.6w(5), DTE Electric argues that it has a right to update the Case No. U-18014 data in this proceeding. DTE Electric's petition for rehearing and clarification, p. 10.

CNE

In response and after summarizing the efforts by DTE Electric to force adjudication of all SRM issues into this docket, CNE states that the Commission has appropriately endeavored to "limit the pending general rate cases to traditional general rate case issues and not novel issues presented by Section 6w of Act 341." CNE response, p. 5. According to CNE, DTE Electric's

petition for rehearing and clarification should be denied because it does not meet the standard for a rehearing set forth in Mich Admin Code, R 792.10437. Citing the July 22, 2016 order in Case No. U-17990 and the December 20, 2016 order in Case No. U-17929, CNE contends that DTE Electric has failed to demonstrate that the May 11 order is either erroneous or will result in unintended consequences.

Next, CNE points out that DTE Electric's reliance on the definition of a general rate case found in MCL 460.6a and on MCL 460.6w(5) is misplaced and does not support DTE Electric's argument that all SRM-related issues must be fully adjudicated in Case No. U-18255. CNE asserts that nothing in the May 11 order precludes the utility "from seeking an increase in rates based on the utility's total cost of providing service." CNE response, p. 9. CNE also maintains that "SRM issues and SRM charges can be removed from DTE's pending rate case without precluding DTE's ability to recover its alleged costs and earn a reasonable rate of return." CNE response, p. 9. Likewise, citing MCL 460.6w(5), CNE insists that DTE Electric is wrong to assert that its SRM issues must be resolved in Case No. U-18255. According to CNE, MCL 460.6w(5) "expressly authorizes the Commission to review SRM charges in separate proceedings established for that purpose," which means that DTE Electric's due process rights were not infringed upon by the May 11 order. CNE response, p. 9.

CNE also reasons that, because "[g]eneral rates have been established based on a utility's total cost of service for decades without any consideration of a SRM," DTE Electric is falsely asserting that a failure to resolve the SRM-related issues in Case No. U-18255 necessarily will render DTE Electric's future rates unjust. CNE response, pp. 9-10. Citing the pre-filed testimony of DTE Electric's witness Kelly A. Holmes, CNE stresses that it is DTE Electric's position in this proceeding that no electric choice customers will take capacity service from the utility during the

test year. CNE response, p. 11. For this reason, CNE insists that the SRM "charges can be stricken from all testimony and exhibits without harming the utility's ability to utilize the remaining proposed rates to recover its alleged revenue requirement." CNE response, p. 11.

CNE maintains that the SRM issues are not germane to DTE Electric's current rate case. CNE also contends that MCL 460.6w(5) is being misinterpreted by DTE Electric. CNE argues that MCL 460.6w(5) clearly allows the Commission to review or amend the SRM-related capacity charge in either a rate case, a power supply cost recovery case, or in "separate proceedings established for that purpose." MCL 460.6w(5); CNE response, p. 12.

On pages 13 to 15 of its response to DTE Electric's petition for rehearing and clarification, CNE argues that acceptance of DTE Electric's position that the utility must be allowed to establish SRM capacity charges in Case No. U-18255 that will be effective June 1, 2018, would constitute a violation of Act 341. CNE's argument is based on the likelihood that the Commission's final order in DTE Electric's current electric rate case will not be issued until mid-April 2018, whereas under MCL 460.6w(3) the deadline for determining the SRM capacity charge will be December 1, 2017, and under MCL 460.6w(8)(b) AESs will have until the seventh business day of February 2018 to procure capacity and make their required capacity demonstrations under Section 6w(8) of Act 341, MCL 460.6w(8). CNE contends:

> Thus, the capacity charge set by December 1 of each year is the capacity charge applicable to that portion of AES load not covered in planning year 4. If a capacity charge is warranted in any of the first four planning years, the capacity charge set by December 1, 2017 under subsection (3) is applicable to each of those first four planning years beginning with the planning year that starts June 1, 2018. Based on the timelines established in Section 6w of Act 341, the SRM charges that will go into effect beginning June 1, 2018 must be determined by December 1, 2017. The Commission must provide notice of those charges. DTE's pending rate case is unlikely to conclude prior to mid-April, 2018. It certainly will not conclude prior to December 1, 2017. The Commission simply cannot approve DTE's request for clarification.

CNE response, p. 15.

Finally, CNE dismisses DTE Electric's allegations that its due process rights will be violated by the May 11 order by observing that both Case No. U-18248 and Case No. U-18255 are contested case proceedings in which full records will be developed. CNE asserts that, in the interest of administrative efficiency, the Commission and the interested parties in Case Nos. U-18248 and U-18255 should not be required to litigate the same issues twice. According to CNE, the Commission is free to "consider DTE's proposed tariff changes and SRM charges to implement the SRM in a contested proceeding separate from a general rate case." CNE response, p. 17.

ABATE

ABATE contends that DTE Electric's petition for rehearing and clarification should be denied because it does not meet any of the thresholds required by R 792.10437 and because the May 11 order does not suffer from a lack of clarity. ABATE is also concerned that DTE Electric is endeavoring to have aspects of both the law that was in effect prior to the effective date of Act 341 and the law that became effective after the effective date of Act 341 apply to this proceeding. According to ABATE, the Commission is following the dictates of the Legislature by resolving the SRM capacity charge in Case No. U-18248, not Case No. U-18255, because the rate case was filed by DTE Electric before the effective date of Act 341.

After restating the history of the Commission orders and providing a description of the utility's dockets that are involved, ABATE maintains that DTE Electric has not met the requirements for rehearing set forth in R 792.10437. Additionally, ABATE insists that DTE Electric is attempting to challenge matters determined in the March 10, 2017 order in Case Nos. U-18239 *et al* (March 10 order), not the May 11 order. Moreover, ABATE contends that neither

the March 10 order nor the May 11 order lack clarity. Because DTE Electric is simply rearguing previously rejected positions in its petition for rehearing and clarification, ABATE argues that DTE Electric has failed to meet the standard set forth in R 792.10437 for rehearing.

ABATE also rebukes DTE Electric for waiting 75 days after issuance by the Commission of the March 10 order that directed the litigation of SRM-related issues for DTE Electric be conducted in Case No. U-18248. ABATE contends that DTE Electric's petition for rehearing and clarification is an untimely effort to challenge the March 10 order because the company delayed filing the petition for rehearing beyond the 30 day period for such rehearing requests to be submitted.

ABATE next contends that there is no reason for the Commission to clarify the May 11 order. According to ABATE, the Commission's frequent and timely guidance regarding the processing of SRM-related issues does not need further clarification. ABATE maintains that the Commission is following the dictates of the Legislature regarding implementation of MCL 460.6w. ABATE argues that DTE Electric's concern about alleged due process issues lacks merit and is of the company's own making by filing its rate case before the effective date of Act 341. Indeed, ABATE asserts that the intervening parties to Case No. U-18255 are likely to have had their own due process rights violated by DTE Electric's actions.

Staff

With regard to the May 11 order, the Staff states that it "agrees with DTE Electric that the Commission should clarify its order to alleviate confusion among the parties in this matter." Staff response, p. 1. However, the Staff next states that it "does not agree with DTE Electric's interpretation of the order." Staff response, p. 1. Specifically, the Staff asserts that the May 11 order has not infringed on the ability of DTE Electric to have rates approved based on the cost of

service. According to the Staff, the Commission merely said in the May 11 order that it intended to determine in Case No. U-18248 how the SRM capacity charge would be calculated and billed to retail open access (ROA) customers taking capacity from DTE Electric. Nevertheless, the Staff goes on to argue:

> Staff agrees with DTE that if the ALJ in the current rate case, MPSC Case No. U-18255, were to interpret the Commission's order in this manner, it would result in an unintended consequence of prohibiting DTE Electric from establishing general service rates based on the Company's total costs.

Staff response, p. 2.

According to the Staff, the Commission should clarify that it intended in the May 11 order to reserve to Case No. U-18248 the policy questions regarding SRM implementation, which would include matters such as the method used to calculate the SRM capacity charge, the manner of billing the SRM capacity charge, and the initial setting of the capacity charge. However, the Staff sides with DTE Electric's position that the May 11 order should not be understood to preclude the utility from re-litigating in Case No. U-18255 the SRM charge to be determined by December 1, 2017 in Case No. U-18248. The Staff maintains that:

> Section 6w does not carve out and provide a separate venue in which the Commission will determine what costs the utility may collect in its rates. The utility will continue to collect 100% of its approved capacity-related and noncapacity-related costs in base rates. This is because the utility cannot know at this time whether some, all, or none of its retail open access load will also be receiving capacity from the utility. Alternative electric suppliers will not be making their capacity showings until February 7 of 2018. As such, the utility must presume that it will not collect any of its costs through the capacity charge, because this could very well be the case. If the utility does in fact collect any amounts during the test year through the capacity charge, those amounts will be reconciled pursuant to Section 6w(4). Furthermore, that reconciliation does not credit capacity charges against the utility's total capacity costs. Setting a capacity charge is not a substitute for determining the level of capacity-related costs a utility can collect in rates.
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> In calculating the capacity charge, Section 6w(3)(a) requires the Commission to first "include the capacity-related generation costs included in the utility's base rates, surcharges, and power supply cost recovery factors." The Commission

> could not follow this statutory mandate if capacity-related costs were excluded from rate cases, and thus from base rates. As such, the Staff believes that the Commission must have intended for DTE Electric to include both capacity-related and noncapacity-related costs in its rates, and the Commission should so clarify.

Staff response, p. 4.

The Staff stresses that in Case Nos. U-18248 and U-18255, DTE Electric has requested approval of identical implementation methods, tariff changes, billing methods, and calculation methodology in both the SRM case and in the general rate case, with one exception. According to the Staff, DTE Electric has proposed different amounts for rates in Case No. U-18255 than in the Case No. U-18248. Therefore, the Staff suggests that the Commission should clarify that, for those matters where there is no dispute over the evidentiary presentations in Case Nos. U-18248 and U-18255, the ALJ need not readdress in the rate case any issues resolved by the Commission in the SRM docket. However, the Staff insists that the Commission also should clarify that "where a party alleges some changed circumstance or new evidence, the ALJ should address that issue under the *Pennwalt* doctrine."[6] Additionally, the Staff maintains that the Commission's clarification should acknowledge that it was proper for DTE Electric to "include the proposed tariffs, capacity charge calculation information, billing information, etc. in the Company's rate case." Staff response, p. 6. The Staff further explains that the ALJ and the Commission need not address the issues in detail in DTE Electric's electric rate case, but may merely state such issues are being approved on the same basis as in the Commission's SRM order, unless there is some allegation of changed circumstances or new evidence in the rate case that was not present in the SRM case. As an example, the Staff suggests that because the capacity-related costs included in Case No. U-18248 were based upon rates set in Case No. U-18014, the capacity charge set in Case No. U-18248 will need to be reviewed in Case No. U-18255.

[6] *Pennwalt Corp v Public Service Comm*, 166 Mich App 1; 420 NW2d 156 (1988).

Finally, the Staff agrees with the May 11 order determination that the capacity demonstration issues are properly consigned to the technical conferences established by the Commission in Case No. U-18197.

Discussion

Based on review of the transcript of the May 18, 2017 prehearing conference, the motions to strike or dismiss currently pending before the ALJ, the petition for rehearing and clarification filed by DTE Electric, and the responses to DTE Electric's petition filed by CNE, ABATE, and the Staff, the Commission finds that there is good cause to clarify its May 11 order at this time. It is now apparent to the Commission that, despite the desire of the Commission to simplify the complexity of several interrelated and time-constrained contested case proceedings that are simultaneously pending before the Commission, accomplishing that goal will still take considerable effort. It remains the Commission's intent to simplify Case No. U-18255, which must be resolved by April 19, 2018. In so doing, the Commission finds that the ALJ, DTE Electric, and the intervening parties should be able to rely upon decisions made in the final order in Case No. U-18248 to avoid the expenditure of their time and resources re-litigating issues in Case No. U-18255 on which there is no debate, fundamental dispute, or change of circumstances from the positions taken in Case No. U-18248. However, the Commission wishes to clarify that the May 11 order was never intended to infringe on any party's right to fully adjudicate any contested issue in Case No. U-18255.

THEREFORE, IT IS ORDERED that:

A. The petition for rehearing and clarification filed by DTE Electric Company on May 26, 2017, is granted.

B. The Commission's May 11, 2017 order in Case No. U-18197 *et al.* is clarified to indicate that the Commission did not intend to require the parties and Administrative Law Judge Mark D. Eyster to expend their time and resources re-litigating issues in Case No. U-18255 on which there is no debate, fundamental dispute, or change of circumstances from the positions taken in Case No. U-18248.

C. The Commission's May 11, 2017 order in Case No. U-18197 *et al.* is further clarified to indicate that the Commission did not intend to foreclose any party's opportunity to update the inputs and data and other evidence submitted in Case No. U-18248 in their presentations in Case No. U-18255 that could have an impact on DTE Electric Company's rates, terms, or conditions of service.

D. The capacity demonstration issues that are being resolved in the context of the technical conferences established by the Commission in Case No. U-18197 shall not be subject to re-litigation in Case No. U-18255.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

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Sally A. Talberg, Chairman

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Norman J. Saari, Commissioner

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Rachael A. Eubanks, Commissioner

By its action of June 15, 2017.

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Kavita Kale, Executive Secretary